IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3804 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DEVNIBEN MOHAN VASAVA

Versus

STATE OF GUJARAT

Appearance:

MR GIRISH PATEL for Petitioner

MS NANDINI JOSHI ASST.GOVERNMENT PLEADER for Respondent No. 1 & 2

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 14/06/2001

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, the petitioner has prayed that the State of Gujarat, Collector, Bharuch and Medical Officer, Primary

Health Centre, Dediapada, Bharuch district be directed to pay compensation of Rs.50,000/- for the mental and physical agony suffered by the petitioner by the birth of a child and the expenses for child's education and maintenance. The claim is made on the ground that the petitioner had undergone the tubectomy operation performed by the respondent in the year 1983 and still thereafter a child was born in the year 1987. The operation was performed on 28-12-1983 and the child was born on 14-9-1987. It is the petitioner's case that at the time of operation, the petitioner was informed that the operation was successful and she may not take any other birth control precautions. However, thereafter, the petitioner came to learn that she has become pregnant again and the time was too late to have a legal abortion. The child was born on 14-9-1987.

2. In Bharuch District Panchayat & Ors. vs. Kanubhai Raijibhai Patel & Ors. reported in 1996 (1) GLH 584, the Division Bench of this Court had an occasion to consider a similar claim which arose from civil suits filed in the trial court. The suits were decreed on the ground that the operations were not successful on account of the negligence of the doctor. Allowing the appeals filed by the District Panchayats, this Court observed as under:

> 4. In these cases, the doctor himself has given evidence that there is a possibility of the operation failing in four to five cases out of 1000. The doctor who has been examined in the first case has stated that he has performed 10,000 operations; in this country of vast population and acute problem of over-population, these operations are performed in millions every year and there will be hundreds of cases where these operations fail in spite of having taken all care and having performed the operations properly, but that percentage is very small even though figures might be running in hundreds. The percentage might be less than 1%, hardly 0.1 to 0.4%, but it is certain that these 0.4% of the operations are likely to fail and it would not be possible to say that it is necessarily due to negligence of the doctor. In some extreme cases of medical negligence, the doctrine of res ipsa loquitur may apply, but in these kind of operations, where thousands are successful and only a small fraction of a portion is failing, it cannot by any means be taken as a proof of negligence by the doctrine of res ipsa loquitur.

3. In view of the aforesaid principle laid down by the Division Bench, it is not possible to hold that the operation in question had failed on account of any medical negligence and that the doctrine of res ipsa loquitur could be invoked.

4. Learned counsel for the petitioner, however, submits that there is a specific statement in para-4 of the petition that when the tubectomy operation was performed on the petitioner on 28-12-1983, she was informed that the operation was successful and she need not take any other birth control precautions. It is, therefore, submitted that there was negligence on the part of the doctor in not informing the petitioner that there was a possibility that despite all care, in a small fraction of cases, the operation could fail and that the child may be born if further precautions are not taken.

It is submitted that in absence of any affidavit-in-reply, the aforesaid averment should be taken as correct and that should be sufficient to hold that there was negligence on the part of the doctor in not giving the aforesaid caution to the petitioner.

5. The petition does not disclose the name of the doctor who performed the operation in question. Respondent No.1 is the State of Gujarat, respondent No.2 is the District Collector, Bharuch, and respondent No.3 is Medical Officer of the Primary Health Centre , Dediapada, Bharuch district who organised the family planning camps. The particular doctor who performed the operation is not joined as a party-respondent. In this view of the matter, it cannot be said that non-filing of any affidavit-in-reply should mean automatic admission of the averments made in paragraph 4 of the petition. As already observed by the Division Bench, in less than 1% cases the operations are likely to fail and it would not be possible to say that it is necessarily due to negligence of the doctor. The very fact that in the instant case, the operation took place in December, 1983 and the child was born in September, 1987, indicates that for a period of at least three yeas the petitioner did not conceive and, therefore, in the facts and circumstances of the case, it cannot be said that there was any such negligence on the part of the doctor who performed the operation that the doctrine of res ipsa loquitur could be invoked.

7. In view of the above discussion, the petition is dismissed. Rule is discharged. No costs.

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